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No. 21F-H2121048-REL

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: August 02, 2021 at 9:00 AM.

ADMINISTRATIVE LAW JUDGE: Jenna Clark.

FINDINGS OF FACT

2. On April 30, 2021, Petitioner filed an amended single-issue petition¹ with the Department which alleged that the Association drafted and posted a letter directed to Petitioner, in response to private correspondence that had not been shared with the Association, in violation of Community Bylaws 3.03 and ARIZ. REV. STAT. §§ 33-1248(A), 33-1248(B), and 33-1261(D).² The petition, which is paraphrased for brevity here, states

2 Petitioner originally filed a \$500.00 single-issue petition on April 28, 2021, with the Department that alleged violations of Community Bylaws 3.03 and ARIZ. REV. STAT. §§ 33-1804(A), 33-1804(B), and 33-1808(G). Petitioner also alleged no less than four (4) additional violations in her Amended Petition that the Department has no jurisdiction over or she lacked standing to bring, such as (1) “my rights as a homeowner,” (2) “my constitutional rights as an American citizen,” (3) “the rights of the Association homeowners,” and (4) the Board’s fiduciary responsibility to act on behalf of its constituents, by creating

1 in pertinent parts that “On February 15, 2021, the day of our Annual Meeting, on the
2 HOA’s on-line platform under Community News, the Board posted a letter written
3 personally to me by the Association attorney.”³ Petitioner also asserted therein that, “The
4 HOA Board published this letter as a rebuttal to a draft letter of mine that had not yet been
5 submitted to management or Board for scheduling a Special Meeting. [The letter] had
6 been left with several homeowners for their review and input, and contained homeowners’
7 concerns to be discussed at the future (unscheduled) meeting.”⁴

8 3. On May 24, 2021, Respondent returned its ANSWER to the Department
9 whereby it denied the merits of Petitioner’s allegation(s).⁵

10 4. Per the NOTICE OF HEARING, the Department referred this matter to the
11 Office of Administrative Hearings (“OAH”), an independent state agency, for an
12 evidentiary hearing on August 02, 2021, regarding the following issue:

13 **Whether Foothills Townhomes Association, Inc. violated violation of**
14 **Community Bylaws 3.03 and ARIZ. REV. STAT. §§ 33-1248(A), 33-**
1248(B), and 33-1261(D).⁶

15 THE PARTIES AND GOVERNING DOCUMENTS

16 5. Respondent is a planned community association whose members own
17 properties in the Foothills Townhomes residential real estate development located in
18 Tucson, Arizona. Membership for the Association is comprised of the Foothills
19 Townhomes owners.

20 6. Petitioner is a Foothills Townhomes owner and a member of the
21 Association.

22 7. The Association is governed by its Covenants, Conditions, and Restrictions
23 (“CC&Rs”) and Bylaws, and overseen by a Board of Directors (“the Board”). The CC&Rs
24 empower the Association to control certain aspects of property use within the
25 development. When a party buys a residential unit in the development, the party receives

26 _____
27 what now functions as a ‘gag order’, intended to prevent freedom of speech and access to information that
affects the community as a whole.” [sic]

28 ³ See Department’s electronic file at H021-21048_Notice_petition.pdf.

29 ⁴ *Id.*

30 ⁵ See Department’s electronic file at H021-21048_Respond_Petition.pdf.

⁶ See Department’s electronic file at H021-21048_Notice_Hearing.pdf.

1 copies of the CC&Rs and Bylaws and agrees to be bound by their terms. Thus, the
2 CC&Rs form an enforceable contract between the Association and each property owner,
3 and the Bylaws outline how the Association is permitted to operate.

4 8. Bylaws Article III, Meetings, Section 3.03 states, "A special meeting of the
5 homeowners may be called at any reasonable time and place by written notice of the
6 Board of Directors or by the home-owners having one-fifth (1/5) of the total votes and
7 delivered to all other homeowners not less than ten (10) days nor more than thirty (30)
8 days prior to the date fixed for said meeting, specifying the date, time and place thereof,
9 and the nature of the business to be undertaken. No business shall be transacted at a
10 special meeting except as stated in said notice unless by consent of a majority of owners
11 present, either in person or by proxy."⁷

12 HEARING EVIDENCE

13 9. Petitioner testified on her own behalf and submitted Exhibits 1-4. The
14 Department's electronic file, NOTICE OF HEARING, and Respondent's REQUEST TO DISMISS
15 PETITION were also admitted into the record. The substantive evidence of record is as
16 follows:

- 17 a. Petitioner ran for election on the Board in 2019, but lost. She was appointed
18 after another Member resigned that same year. Petitioner resigned shortly
19 thereafter, due to witnessing the Association's alleged and unspecified
20 "liabilities" and "illegal actions."
- 21 b. Per Petitioner, she and other Association members wished to have a litany
22 of issues; including but not limited to meeting minutes, water bills, financial
23 statements, and due increases, placed on the Board's monthly meeting
24 agendas for open discussion but were unable to do so. Petitioner, with the
25 participation of other homeowners, planned to request a special meeting in
26 order to discuss the issues.
- 27 c. Although Petitioner drafted a special meeting request, and although it was
28 never submitted to the Board, the Board nonetheless came into possession

29 ⁷ See Department's electronic file at H021-21048_Statutes & CCRs.pdf.

1 of Petitioner's draft copy; which was posted on the Association's website on
2 February 15, 2021, for its annual meeting. Additionally, a written response
3 directed to Petitioner by the Association's attorney was also posted on the
4 website

5 i. Petitioner perceived the Association's conduct as an act to dismantle
6 a platform for discussion and retaliate against her.

7 d. Petitioner drafted a rebuttal to the Association's attorney's response to her
8 draft letter, and asked for the Association to publish it on their website. The
9 Association refused.

10 i. Petitioner perceived the Association's refusal as an acts of "malice"
11 and "discrimination" against her.

12 10. In closing, Petitioner argued that the Association violated the intent of the
13 laws applicable to this matter, and in doing so, also violated her rights. Petitioner opined
14 that the Association breached its fiduciary duty to listen to listen to homeowner concerns,
15 and provide them with a platform for open discussion.

16 11. In closing, Respondent argued that the underlying petition failed to state
17 claims that the Homeowners Association Dispute Resolution process could
18 resolve. Respondent further argued that Petitioner did not sustain her burden of
19 proof, and opined that as such, her petition should be dismissed.

20 **CONCLUSIONS OF LAW**

21 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.
22 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
23 condominium and/or planned community association. The owner or association may
24 petition the department for a hearing concerning violations of community documents or
25 violations of the statutes that regulate planned communities as long as the petitioner has
26 filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. §
27 32-2199.05.

1 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
2 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
3 case at bar. OAH has the authority to interpret the contract between the parties.⁸

4 3. In this proceeding, Petitioner bears the burden of proving by a
5 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.⁹

6 4. “A preponderance of the evidence is such proof as convinces the trier of fact
7 that the contention is more probably true than not.”¹⁰ A preponderance of the evidence is
8 “[t]he greater weight of the evidence, not necessarily established by the greater number of
9 witnesses testifying to a fact but by evidence that has the most convincing force; superior
10 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
11 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
12 the other.”¹¹

13 5. Condominium Associations are regulated by ARIZ. REV. STAT. Title 33,
14 Chapter 9, Article 3.

15 6. Planned Communities are regulated by ARIZ. REV. STAT. Title 33, Chapter
16 16, Article 1.

17 7. Because Petitioner only paid for the adjudication of one (1) issue, this
18 Tribunal may not address all of the issues Petitioner raised in her petition or during her
19 testimony. However, because Petitioner’s amended petition specifically alleges violations
20 of ARIZ. REV. STAT. § 33-1248(A), 33-1248(B) and 33-1261(D), which are inapplicable as
21 the Association is not subject to governance or regulation by these statutes, the concerns
22 are rendered moot. Petitioner has not sustained her burden of proof as to these alleged
23 statutory violations.

24 8. Therefore, the only issue to be addressed in this matter is whether
25 Respondent committed a violation of Community Bylaws 3.03. The material facts in this
26 respect are clear.

27
28 ⁸ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ⁹ See ARIZ. ADMIN. CODE R2-19-119.

30 ¹⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹¹ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

9. No violation of Bylaws Section 3.03 exists because the issue is unripe. Here, the record reflects that a special meeting was not held, nor had Petitioner requested one prior to the filing of her petition in this matter. Instead, Petitioner's grievance is the Association's public dissemination and address of her private correspondence; which is not a violation of Bylaws Section 3.03. Additionally, Petitioner's belief that Respondent's actions had a chilling effect on member discussions during the Annual Meeting held February 15, 2021, is also not a violation of Bylaws Section 3.03.

10. Therefore, the undersigned Administrative Law Judge concludes that because Petitioner failed to sustain her burden of proof by a preponderance of the evidence that the Association violated Bylaws Section 3.03, her petition must be denied.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

NOTICE

Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Arizona Department of Real Estate within 30 days of the service of this Order upon the parties.

Done this day, August 23, 2021.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile on August 23, 2021:

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